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AUG 17 2009

Federal Communications Commission  
Office of the Secretary

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FILE NO:

August 17, 2009

**VIA HAND DELIVERY**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
c/o Natek, Inc.  
236 Massachusetts Ave, N.E.  
Suite 110  
Washington, DC 20002

Re: Petition of American Electric Power Service Corporation, Duke Energy Corporation, Southern Company Services, Inc., and Xcel Energy Services Inc., for a Declaratory Ruling

Dear Ms. Dortch:

On behalf of American Electric Power Service Corporation, Duke Energy Corporation, Southern Company, and Xcel Energy Services Inc. (collectively "Petitioners"), enclosed please find the "Petition for Declaratory Ruling that the Telecommunications Rate Applies to Cable System Pole Attachments Used to Provide Interconnected Voice over Internet Protocol Service."

Please direct any questions or communications regarding this matter to the undersigned.

Respectfully submitted,



Sean B. Cunningham

Enclosure

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20544**

Petition for Declaratory Ruling that )  
the Telecommunications Rate Applies to Cable ) WC Docket No. \_\_\_\_\_  
System Pole Attachments Used to Provide )  
Interconnected Voice over Internet Protocol Service )

**PETITION OF  
AMERICAN ELECTRIC POWER SERVICE CORPORATION,  
DUKE ENERGY CORPORATION,  
SOUTHERN COMPANY, AND  
XCEL ENERGY SERVICES INC.  
FOR A DECLARATORY RULING**

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Electric Power Service Corporation,  
Duke Energy Corporation,  
Southern Company, and  
Xcel Energy Services Inc.*

August 17, 2009

## EXECUTIVE SUMMARY

- The Petitioners respectfully request the Federal Communications Commission (“Commission”) to issue a declaratory ruling that the telecommunications rate (“Telecom Rate”), which applies to jurisdictional pole attachments used for traditional telephone service, also applies to cable system pole attachments used to provide interconnected voice over internet protocol (“VoIP”) service.
- It is well known that VoIP is increasingly a replacement for analog voice service, yet cable companies continue to claim that the Telecom Rate does not apply to attachments used to provide VoIP. The resulting billing disputes use time and resources that could be better used to further the deployment of VoIP and other broadband technologies. The requested ruling is therefore urgently needed to clarify that the Telecom Rate applies to cable company attachments used to provide VoIP.
- To fulfill its statutory obligation to regulate pole attachment rates and promote broadband, the Commission must act promptly to fill this regulatory gap without waiting to resolve larger questions regarding the regulatory classification of VoIP.
- Regardless of how VoIP is ultimately classified for other regulatory purposes, the Commission has a statutory mandate under the nondiscrimination provision of section 224(e) to apply the Telecom Rate to cable system pole attachments used to provide interconnected VoIP.
- Applying the cable rate formula (“Cable Rate”) to attachments used for VoIP would give an unfair competitive advantage to cable VoIP providers relative to competitive telephone service providers subject to the Telecom Rate. Applying the Telecom Rate to such attachments would bring greater regulatory parity and thereby promote broadband deployment.
- Under section 224, the historic Cable Rate is not the “default” rate for attachments used by cable operators to provide commingled cable and other services, such as VoIP. On the contrary, Congress intended to provide for a transition from a subsidized rate for the then-“infant” cable industry to the higher Telecom Rate for full-fledged cable participants in voice telephony markets.
- Electricity consumers, many of whom do not subscribe to VoIP services, must not be forced to subsidize cable giants like Comcast and Time Warner Cable.
- The requested clarification is a measure the Commission can, and should, take expeditiously prior to consideration of the broader issues raised in the Broadband NOI and proposed rulemakings on IP-enabled services and pole attachments.

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FOR A DECLARATORY RULING**

**PETITION FOR DECLARATORY RULING**

American Electric Power Service Corporation, Duke Energy Corporation, Southern Company, and Xcel Energy Services Inc. (collectively "Petitioners")<sup>1</sup> respectfully request the Commission to issue a declaratory ruling that the telecommunications rate formula ("Telecom Rate"),<sup>2</sup> which applies to jurisdictional pole attachments used for traditional telephone service,<sup>3</sup> also applies to cable system pole attachments used to provide interconnected voice over internet protocol service ("interconnected VoIP" or "VoIP").<sup>4</sup> It is well known that VoIP is "increasingly

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<sup>1</sup> The Petitioners are a group of four companies that serve electric consumers in 23 states and numerous metropolitan areas and own and maintain large numbers of poles with third-party attachments. The Petitioners serve both urban and rural areas in 18 of the 30 states in which pole attachments are regulated by the Commission.

<sup>2</sup> 47 C.F.R. § 1.1409(e)(2) (2008).

<sup>3</sup> This petition focuses on attachments by cable systems. Attachments by competitive local exchange carriers ("CLECs") are already covered by the Telecom Rate. Because incumbent local exchange carriers ("ILECs") are excluded from the definition of "telecommunications carrier" in section 224 of the Communications Act (47 U.S.C. § 224(a)(5)), ILEC attachments on electric poles are not subject to the Commission's pole attachment jurisdiction.

<sup>4</sup> The Commission's regulations define "interconnected VoIP" as "a service that: (1) Enables real-time, two-way voice communications; (2) Requires a broadband connection from the user's location; (3) Requires Internet

used to replace analog voice service,”<sup>5</sup> yet cable companies continue to claim that the Telecom Rate does not apply to cable attachments used to provide VoIP. The resulting billing disputes between cable companies and pole owners use time and resources that could be better used to deploy VoIP and other broadband technologies to help achieve important national priorities.<sup>6</sup> Moreover, the application of the Cable Rate to attachments used to provide VoIP gives cable companies an unfair competitive advantage over non-cable, competitive telecommunications carriers who provide similar voice and broadband services, yet who are statutorily subject to the Telecom Rate. This discriminatory treatment in favor of cable operators is not only contrary to the non-discrimination requirement of section 224(e) of the Communications Act,<sup>7</sup> but also distorts the market and may thereby inhibit the deployment of competitive broadband infrastructure and services to the detriment of U.S. consumers.

The requested ruling is therefore urgently needed to remove any uncertainty regarding the applicability of the Telecom Rate to cable company attachments used to provide VoIP. To fulfill

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protocol-compatible customer premises equipment (CPE); and (4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.” 47 C.F.R. § 9.3. This petition addresses all attachments by cable companies that are used to provide VoIP services, including VoIP provided by the cable company itself (e.g., Comcast Digital Voice), by a cable affiliate, or by any third party using the attached cable wire (e.g., Vonage Digital Voice).

<sup>5</sup> *IP-Enabled Services*, WC Docket No. 04-36, Report and Order, FCC 09-40 at para. 12 (2009) (“Discontinuance Order”), quoting *Telephone Number Requirements for IP-Enabled Services Providers; Local Number Portability Porting Interval and Validation Requirements; IP-Enabled Services; Telephone Number Portability; Numbering Resource Optimization*, WC Docket Nos. 07-243, 07-244, 04-36, CC Docket Nos. 950116, 99-200, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531 at para. 18 (2007), *pet. for review pending sub nom. National Telecomms. Cooperative Ass’n v. FCC* (D.C. Cir. No. 08-1071) (“VoIP LNP Order”).

<sup>6</sup> For example, as President Obama has emphasized, broadband-based electric utility “smart grid” systems have the potential to “save us money, protect our power sources from blackout or attack, and deliver clean, alternative forms of energy to every corner of our nation.” See U.S. News & World Report, *President-elect Barack Obama on His American Recovery and Reinvestment Plan - Remarks of President-elect Barack Obama as prepared for delivery* (January 8, 2009), available at < <http://www.usnews.com/articles/news/stimulus/2009/01/08/president-elect-barack-obama-on-his-american-recovery-and-reinvestment-plan.html> > (last accessed August 11, 2009).

<sup>7</sup> 47 U.S.C. § 224(e) (2006).

its statutory obligation to “regulate” pole attachment rates and promote broadband,<sup>8</sup> the Commission must act promptly to fill this regulatory gap without waiting to resolve larger policy questions regarding the regulatory classification of VoIP.

The Petitioners support broadband deployment and seek to work constructively with the Commission in its efforts to implement the broadband provisions of the American Recovery and Reinvestment Act of 2009 (“Recovery Act”).<sup>9</sup> Electric utility poles are a shared critical infrastructure whose primary purpose is to enable safe, reliable distribution of electric power. This critical infrastructure is also an expedient physical platform for communications and broadband deployment. By eliminating regulatory uncertainty regarding the applicable rate for cable attachments used to provide VoIP, the requested ruling will help ensure that poles and pole attachments continue to serve as an opportune platform for broadband deployment.<sup>10</sup>

In its *IP-Enabled Services* proceeding, the Commission continues to consider whether VoIP is a “telecommunications service,” an “information service,” or neither.<sup>11</sup> Regardless of how VoIP is ultimately classified for other regulatory purposes, the Commission has a statutory mandate under the nondiscrimination provision of section 224(e)—as well as ample authority under section 224 otherwise—to apply the Telecom Rate to cable system pole attachments used to provide interconnected VoIP. Neither good policy nor a sound reading of the statute would support applying the historic Cable Rate to cable VoIP attachments, which would give an unfair

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<sup>8</sup> 47 U.S.C. § 224(b) (2006) (“the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable”). *See also* 47 U.S.C. § 157 (2006) (“It shall be the policy of the United States to encourage the provision of new technologies and services to the public”).

<sup>9</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

<sup>10</sup> *See A National Broadband Plan for Our Future*, GN Docket No. 09-51, Comments of Utilities Telecom Council and Edison Electric Institute at 14-15 (filed June 8, 2009) (explaining that, far from being impediments, pole attachments facilitate broadband deployment).

<sup>11</sup> Discontinuance Order at fn. 21.

competitive advantage to cable company VoIP providers relative to competitive telephone service providers subject to the Telecom Rate. By contrast, clarifying that the Telecom Rate applies to cable VoIP will “ensure regulatory parity among providers of similar services [and thereby] minimize marketplace distortions . . . .”<sup>12</sup> The requested clarification is a measure the Commission can take—and should take—expeditiously prior to consideration of the broader issues raised in the Broadband NOI and proposed rulemakings on IP-enabled services and pole attachments.<sup>13</sup>

## I. FACTS AND POLICY DISCUSSION

The Petitioners agree with the Commission that the “once-clear distinction between ‘cable television systems’ and ‘telecommunications carriers’ has blurred as each type of company enters markets for the delivery of services historically associated with each other.”<sup>14</sup> In particular, the Commission has repeatedly found that interconnected VoIP is “functionally indistinguishable” from traditional telephony and has, accordingly, subjected VoIP to an array of regulations applicable to traditional telecommunications services. Cable company advertising and other public statements reflect such convergence, boasting that VoIP is the same as ordinary telephone service and referring to themselves as competitors in the “telecommunications” industry. Cable companies also hold themselves out as telecommunications carriers to state regulators in order to provide local telephone service and to obtain regulatory benefits such as interconnection rights.

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<sup>12</sup> VoIP LNP Order at para. 17.

<sup>13</sup> See *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM Docket Nos. 11293, 11303, Notice of Proposed Rulemaking, 22 FCC Rcd 20195 (2007) (“Pole Attachment NPRM”).

<sup>14</sup> Pole Attachment NPRM at para. 14.

Yet, the same cable “telecommunications” competitors continue to represent to electric utility pole owners that VoIP is not really a telecommunications service subject to the Telecom Rate. The result is confusion and ongoing disputes between cable operators and electric utility pole owners. If permitted to pay the cable rate for VoIP attachments, cable companies will enjoy an unjust competitive advantage relative to other telecommunications service providers—surely not a desired outcome on the part of the Commission. Furthermore, this disparity in rates between competing providers of functionally equivalent services results in a continued subsidy borne on the backs of one of the country’s largest consumer segments—the electric ratepayer.

**A. VoIP is a substitute for traditional telephone service and, accordingly, is subject to many of the same regulations which apply to CLECs.**

The Commission has repeatedly found that interconnected VoIP is a “replacement” or “substitute” for traditional voice telephony provided by competitive local exchange carriers (“CLECs”) and other telecommunications carriers.<sup>15</sup> Internet Protocol networks are, to a degree, “technically and administratively” different from the public switched telephone network (“PSTN”), the main difference being that IP-enabled services use broadband Internet connections instead of ordinary phone lines.<sup>16</sup> But VoIP is “*functionally indistinguishable*” from traditional telephone service.<sup>17</sup> VoIP enables the customer, using a broadband connection, to terminate calls

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<sup>15</sup> See Discontinuance Order at para. 8, (“interconnected VoIP service increasingly is used as a replacement for traditional voice service”); accord, VoIP LNP Order at paras. 18, 28 (“VoIP service is ‘increasingly used to replace analog voice service,’ including, in some cases, local exchange service” and “interconnected VoIP services are increasingly being used as a substitute for traditional telephone service”); see *Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, MD Docket No. 07-81, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15712, at para. 12 (2007) (“Regulatory Fees Order”) (“Interconnected VoIP service is increasingly used to replace traditional phone service and ... the interconnected VoIP service industry continues to grow and to attract customers who previously relied on traditional voice service...”).

<sup>16</sup> See *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4917, para. 4 (2004) (“VoIP NPRM”).

<sup>17</sup> Discontinuance Order at para. 12 (emphasis added).

to the PSTN and receive calls originating on the PSTN.<sup>18</sup> From the perspective of the telecommunications services consumer, as well as those with whom the consumer communicates, VoIP technology is “virtually indistinguishable” from traditional telephone service offered by competing telephone companies.<sup>19</sup> As evidence of the substitutability of IP-enabled services generally, “the American public has embraced them, resulting in the widespread adoption of mass market interconnected [VoIP] and broadband services by millions of consumers for voice, video, and Internet communications.”<sup>20</sup>

As the Commission noted in its Regulatory Fees Order, the “explosive growth” of the VoIP industry and the extent to which VoIP is used as a replacement for traditional telephone service have “necessitated” numerous Commission rulings that VoIP is subject to the same regulations that apply to telephone service provided by telecommunications carriers.<sup>21</sup> These regulations include an array of requirements under Title II of the Communications Act:

- 911 emergency calling capability requirements (section 251(e));<sup>22</sup>
- universal service contribution obligations (section 254(d));<sup>23</sup>

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<sup>18</sup> VoIP LNP Order at para. 12.

<sup>19</sup> *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, CC Docket No. 96-115, WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 at para. 56 (2007) (“CPNI Order”), *aff'd*, *National Cable & Telecomms. Ass'n v. FCC*, 555 F.3d 996 (D.C. Cir. 2009) (“these services, from the perspective of a customer making an ordinary telephone call, are virtually indistinguishable” from the telephone services of a wireline carrier); *see also* Regulatory Fees Order at para. 18 (“interconnected VoIP providers offer a service that is almost indistinguishable from the consumers’ point of view, from the service offered by interstate telecommunications service providers”); *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36,05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, at para. 24 (2005) (“VoIP 911 Order”), *aff'd*, *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006); (using the term “VoIP” to refer to “services that mimic traditional telephony”).

<sup>20</sup> Discontinuance Order at para. 1.

<sup>21</sup> Regulatory Fees Order at para. 18; *see also* VoIP LNP Order at para. 19 (“these characteristics of interconnected VoIP service support a finding that it is appropriate to extend LNP obligations to include such services ...”).

<sup>22</sup> 47 U.S.C. § 251(e). *See* VoIP 911 Order at para. 1.

- customer proprietary network information (“CPNI”) requirements (section 222),<sup>24</sup>
- disability access obligations (section 255),<sup>25</sup>
- Telecommunications Relay Service (“TRS”) (section 225(b)(1)),<sup>26</sup> and
- local number portability (“LNP”) and numbering administration support obligations (sections 251(e) and 251(b)(2)).<sup>27</sup>

The Commission has also determined that interconnected VoIP is subject to the Communications Assistance for Law Enforcement Act (“CALEA”) and has required VoIP providers to pay regulatory fees at the same rate as telecommunications services providers, based on FCC Form 499-A revenue data.<sup>28</sup> Thus, in numerous contexts, the Commission has already deemed VoIP to be the same as telecommunications service.

**B. Cable companies boast that their VoIP services are comparable to voice telecommunications service offered by competitors.**

In countless public advertisements and other publicly available documents, cable companies have made no secret that their VoIP services are competing with telephone companies in markets for telecommunications services. In fact, they openly boast that they offer voice

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<sup>23</sup> 47 U.S.C. § 254(d). See *Universal Service Contribution Methodology*, WC Docket No. 06-122; CC Docket Nos. 96-45, 98-171, 90-571, 92-237; NSD File No. L-00-72; CC Docket Nos. 99-200, 95-116, 98-170; WC Docket No. 04-36, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7538-43, paras. 38-49 (2006) (“Universal Service Order”), *aff’d in part, vacated in part sub nom. Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1244 (D.C. Cir. 2007).

<sup>24</sup> 47 U.S.C. § 222. See CPNI Order.

<sup>25</sup> 47 U.S.C. § 255. *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities*, WC Docket No. 04-36, WT Docket No. 96-198, CG Docket No. 03-123 & CC Docket No. 92-105, Report and Order, 22 FCC Rcd 11275, 11291-97 (June 15, 2007) (“TRS and Disability Access VoIP Order”).

<sup>26</sup> 47 U.S.C. § 225(b)(1). See TRS and Disability Access VoIP Order.

<sup>27</sup> *Id.* at §§ 251(e) and 251(b)(2). See VOIP LNP Order.

<sup>28</sup> See *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, RM-10865, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, at para. 1 (2005) (“CALEA VoIP Order”), *aff’d sub nom. American Council on Educ. v. FCC*, 451 F.3d 226 (D.C. Cir. 2006); see also *Regulatory Fees Order* at paras. 11-13.

telecommunications services, or an equal (or better) substitute. Significantly, the former National Cable Television Association, in 2001, changed its name to the National Cable *and Telecommunications* Association (“NCTA”),<sup>29</sup> confirming that its members offer telecommunications services, not just television service. Moreover, the press release announcing the name change stated that the “new name better reflects the industry’s changing landscape,” since broadband has allowed the cable industry to provide “entertainment, information *and telecommunications services*.”<sup>30</sup> More recently, NCTA’s “talking points” entitled *The Cable Bundle is a Great Value for Consumers*, posted on NCTA’s public website, boasts of its status as a full-fledged competitor: “Cable offers real phone competition.... Cable has risen to be a true competitor to the Bell giants in the residential voice market.”<sup>31</sup> NCTA’s website also reports that, as of December 2008, 19.6 million customers had switched to VoIP or other telephony services provided by cable companies.<sup>32</sup> Comcast’s Digital Voice service alone has made Comcast “the third largest residential phone service provider in the U.S., serving nearly 6.5 million customers.”<sup>33</sup>

Nationwide, “most” cable companies are providing VoIP phone service.<sup>34</sup> Through frequent (if not daily) mailings, the major cable companies boast of their voice telephony

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<sup>29</sup> NCTA, *NCTA Changes its name to National Cable & Telecommunications Association* (April 30, 2001), available at <http://www.ncta.com/ReleaseType/MediaRelease/131.aspx> (last accessed August 11, 2009) (emphasis added) (included as Attachment I).

<sup>30</sup> *Id.* (emphasis added).

<sup>31</sup> NCTA, *Talking Points: The Cable Bundle is a Great Value for Consumers* (March 10, 2009), available at <http://www.ncta.com/PublicationType/TalkingPoint/CablePricing.aspx> (last accessed August 12, 2009).

<sup>32</sup> NCTA, *Industry Data* available at <http://www.ncta.com/Statistics.aspx> (last accessed June 22, 2009).

<sup>33</sup> See Comcast, *2008 Annual Review - Digital Voice* available at <http://www.comcast.com/2008annualreview/delivering/digitalvoice.html> (last accessed June 23, 2009).

<sup>34</sup> NCTA, *Digital Phone/Cable Telephony Issue Brief*, available at <http://www.ncta.com/IssueBriefs/Digital-Phone-Cable-Telephony.aspx> (last accessed June 23, 2009).

offerings via “triple play” and similar “bundles.” Prospective subscribers are assured that cable VoIP is equal to or better than regular telephone service:

- Comcast touts “our reliable home phone service.”<sup>35</sup>
- Comcast of Georgia explains: “You are probably wondering about the digital voice telephone service. Comcast has used digital technology and applied it to the traditional telephone, giving subscribers better service including extra features and better sound quality.”<sup>36</sup>
- Time Warner Cable notes that its Digital Phone service “works with your existing phones and jacks. There’s nothing to buy.”<sup>37</sup>
- Cox bluntly states that “Cox phone [service] is the same primary line telephone service you’ve known for years inside your home.”<sup>38</sup>

If the VoIP telephone services these cable giants are providing are indeed “the same” as any other telephone service, cable VoIP providers should be subject to the same rate for pole attachments as their telecommunications carrier counterparts.

**C. Cable companies hold themselves out to state regulators as telephone service providers.**

Further support for treating cable companies providing VoIP as telecommunications carriers may be found in the fact that many of these cable companies hold themselves out to state regulators as providers of local exchange and interexchange telephone services. These cable companies operate pursuant to certificates of public convenience and necessity issued by state regulators for the provision of CLEC and interexchange carrier (“IXC”) services and file tariffs

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<sup>35</sup> See Comcast, *2008 Annual Review - Digital Voice* available at <<http://www.comcast.com/Corporate/Learn/DigitalVoice/digitalvoice.html>> (last accessed June 23, 2009).

<sup>36</sup> See Comcast Georgia, *Comcast Georgia Offers Digital Cable, High Speed Internet & Phone* available at <<http://comcast.usdirect.com/georgia-comcast.html>> (last accessed June 23, 2009).

<sup>37</sup> See Time Warner Cable, *Digital Phone* available at <<http://www.timewarnercable.com/CentralNY/learn/phone/default.html>> (last accessed June 23, 2009).

<sup>38</sup> See Cox, *Find Out More - More You Can Do with Cox Phone* available at <<http://ww2.cox.com/residential/northernvirginia/phone/answers-about-phone.cox>> (last accessed June 23, 2009) (emphasis added).

with state regulators for the provision of these services to the public.<sup>39</sup> If these companies were actually using their facilities “solely to provide cable service,” they would have no need to obtain state CLEC or IXC certification, nor would they have any need to file and maintain tariffs with state regulators for the provision of local exchange and interexchange telecommunications services.

There are two primary reasons for cable companies to voluntarily undergo the state certification and tariffing process. First, many state regulators have recognized that the interconnected VoIP services provided by cable companies are functionally equivalent to—and real-world substitutes for—traditional telephone service, and therefore should be subject to the same rights and obligations as any other competitive telephone service provider. Second, by obtaining a state certification as a telecommunications carrier, a cable company obtains significant advantages such as statutory interconnection rights.<sup>40</sup>

Yet while cable companies are eager to hold themselves out as competitive telecommunications carriers when there is a regulatory advantage to be gained—such as interconnection—they are just as eager to insist that they are not providing telecommunications service when asked to pay the same pole attachment rates that apply to their competitors. In this

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<sup>39</sup> For example, Comcast's subsidiary Comcast Phone of Georgia, LLC holds IXC Certificate X-1035 and CLEC Certificate L-002 issued by the Georgia Public Service Commission (“Georgia PSC”). *See IXC Certificate X-1035 for Comcast Phone of Georgia, LLC d/b/a Comcast Digital Phone*, Georgia Public Service Commission Docket No. 14027-U (revised March 24, 2008) and *CLEC Certificate L-002 for Comcast Phone of Georgia, LLC d/b/a Comcast Digital Phone*, Georgia Public Service Commission Docket No. 5943-U (revised June 23, 2005). Comcast Phone of Georgia, LLC also has tariffs on file with the Georgia PSC for the provision of Local Exchange Services, Interexchange Services, and Access Service. *See Comcast Phone of Georgia LLC Local Exchange Services Tariff No. 3* (effective Feb. 14, 2003), *Comcast Phone of Georgia LLC Interexchange Service Tariff No. 2* (effective Feb. 14, 2003), and *Comcast Phone of Georgia LLC Access Service Tariff No. 1* (effective April 16, 2009), available at <<http://www.comcast.com/corporate/about/phonetermsofservice/circuit-switched/statetariffs/georgia.html>> (last accessed August 11, 2009).

<sup>40</sup> *See, e.g., Petition of Time Warner Cable for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Rcd 3513 at para. 8 (2007).

way, cable companies are able to engage in unfair regulatory arbitrage to the detriment of competition and consumers.

**D. Applying the Cable Rate to VoIP attachments gives cable companies an unfair competitive advantage over other telephone service providers.**

The legislative history of the Pole Attachments Act (as amended by the Telecommunications Act of 1996) shows that the Cable Rate was “established to spur the growth of the cable industry, *which in 1978 was in its infancy.*”<sup>41</sup> It is abundantly clear today that the cable industry is no longer an infant industry, and its spectacularly successful VoIP services have no need of further regulatory “incubation” in the form of a competition-distorting pole attachment rate advantage. As former Commissioner Abernathy cautioned, “the interest in developing nascent platforms cannot justify regulatory disparities indefinitely.”<sup>42</sup> Explaining the “nascent services doctrine,” she specifically warned that “applying different regulations to providers in a single market inevitably causes marketplace distortions and leads to inefficient investment.”<sup>43</sup>

To the extent a cable operator provides telephony services that are functionally equivalent to traditional telephone service, such cable operator should be subject to the same pole attachment rate as other telephony providers whose attachments are under the Commission’s pole attachment jurisdiction. The requested ruling will eliminate the glaring regulatory disparity between attachment rates for providers of competitive telephone services. By eliminating this regulatory disparity, the Commission will also eliminate opportunities for regulatory arbitrage and establish a level playing field that will benefit competition and consumers.

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<sup>41</sup> H. Rpt. 104-204, Committee on Commerce Report to Accompany H.R. 1555, the Communications Act of 1995 (July 24, 1995) (emphasis added).

<sup>42</sup> Remarks of FCC Commissioner Kathleen Q. Abernathy Before the Federal Communications Bar Association New York Chapter, New York, NY, July 11, 2002 at 3.

<sup>43</sup> *Id.*

**E. Applying the Cable Rate to VoIP would place an additional cost burden on consumers.**

The disparity between the pole attachment rates paid by competitive telecommunication carriers and by cable companies providing functionally equivalent telephone services also places a significant cost burden on one of the largest groups of U.S. consumers; namely, electric ratepayers. In general, pole attachments are not a separate "profit centers" for electric utilities. Rather, the revenues generated by pole attachments serve to offset the pole infrastructure costs incurred by the utility. Every dollar that a cable company avoids paying for its use of the space on the utility's pole is one dollar more that must be rolled into the costs that make up the utility's regulated rate to consumers. Conversely, if the Commission were to establish regulatory parity between telecommunications carriers and cable companies providing functionally equivalent VoIP, every dollar received from the cable company is one less dollar that must be incorporated into a utility's retail rates. Accordingly, clarification by the Commission that the Telecom Rate applies to cable attachments used for VoIP telephony will reduce the cost burden borne by electric ratepayers, many of whom cannot even afford the cable company services that they currently subsidize.

**F. Cable companies cause disputes by claiming to electric utility pole owners that VoIP is not a telecommunications service subject to the Telecom Rate.**

It is virtually impossible for an electric utility to determine which pole attachment rate applies to cable attachments on its poles if the attaching cable operator does not identify the nature of the service it offers using those attachments. Under the Commission's regulations, cable operators are required to notify the pole owner "upon offering telecommunications services."<sup>44</sup> However, in many cases, the only "notice" the pole owner receives is in the form of

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<sup>44</sup> 47 C.F.R. § 1.1403(e).

advertisements announcing that the cable company now offers a “triple play” bundle of video, internet, and voice services in one subscription.

Although these cable companies boast that their voice services are “the same” as voice telecommunications services provided by telephone companies, the same cable companies routinely insist to utility pole owners that their attachments are not being used to provide telecommunications services. For example, in a letter to Georgia Power Company, the Cable Television Association of Georgia (“CTAG”) explains at length that “VoIP is Not Telecommunications”<sup>45</sup> and therefore cable companies should not be required to pay the higher Telecommunications Rate for the pole attachments used to provide VoIP services. Such statements are at odds with cable industry representations to consumers and to state regulators and make a mockery of the Commission’s requirement that cable companies notify pole owners upon providing telecommunications services.

Cable companies’ insistence on paying only the Cable Rate for VoIP attachments has also given rise to disputes with CLECs who object to the unfair and discriminatory competitive advantage their cable telephony competitors receive as a result of this disparate treatment. In a request for mediation of a pole attachment dispute filed by EasyTEL, a CLEC that attaches to poles owned by Public Service Company of Oklahoma (“PSO”), EasyTEL complained that “[b]y charging EasyTEL the ‘telecommunications rate’ and failing to charge the same rate to similar providers, such as Cox, PSO violates the requirement to apply its rates on a non-discriminatory basis.”<sup>46</sup> In this case, Cox claimed to provide only video and broadband Internet access services, including VoIP, to its residential customers. The requested declaratory ruling would eliminate

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<sup>45</sup> Letter from Cable Television Association of Georgia to Georgia Power, December 12, 2008 (included as Attachment II) (capitalized in the original) (“CTAG Letter”).

<sup>46</sup> Letter from EasyTel to Marlene H. Dortch, Secretary Federal Communications Commission at 2-3, August 1, 2008 (included as Attachment III).

what EasyTEL describes as the “discriminatory pole attachment rate regime that benefits the larger, entrenched cable operator . . . .”<sup>47</sup>

**G. Clarifying that the Telecom Rate applies to VoIP would help eliminate such disputes and facilitate broadband penetration through greater regulatory parity in voice telephony markets.**

The Petitioners agree with the Commission that “[t]imely and reasonably priced access to poles and rights of way is critical to the buildout of broadband infrastructure in rural areas.”<sup>48</sup> To ensure such access, the Commission should clarify its pole attachment rules to reduce the opportunity for cable companies to instigate disputes and ensure that pole attachment rates for similar services are the same. Different pole attachment rates for similar services inherently gives rise to disputes which use time and resources that could, instead, be devoted to broadband deployment. Clarifying that the Telecom Rate applies to all equivalent telephony services, including VoIP, will eliminate the principal cause of such disputes.

The best way to promote broadband is to promote competition. Regulatory parity and economically efficient price signals are needed for true competition. In its Broadband NOI, the Commission was correct to seek comment on the role of “marketplace competition” in broadband deployment.<sup>49</sup> In several VoIP orders, the Commission cited the need to foster competition by creating a level playing field for providers of equivalent services. In determining that VoIP is subject to LNP requirements, the Commission stated: “[w]e believe that these steps we take to ensure regulatory parity among providers of similar services will minimize

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<sup>47</sup> *Id.* at 2.

<sup>48</sup> Michael J. Copps, Acting Chairman Federal Communications Commission, *Bringing Broadband to Rural America - Report on a Rural Broadband Strategy* at para. 157 (May 22, 2009) available at <[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-291012A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291012A1.pdf)>.

<sup>49</sup> Broadband NOI at paras. 25, 49 (seeking “comment on the extent to which competition between various broadband . . . providers should be evaluated as an effective and efficient mechanism to achieve the goals of the Recovery Act”).

marketplace distortions arising from regulatory advantage.”<sup>50</sup> If interconnected VoIP providers were exempt from LNP, they “would sustain a competitive advantage against telecommunications carriers . . . thus defeating the critical requirement under section 251(e) that carriers bear such costs on a competitively neutral basis.”<sup>51</sup> Analogously, if cable systems that provide VoIP are exempt from the Telecom Rate, they will continue to sustain a competitive advantage against their CLEC counterparts, thus defeating a critical purpose of section 224 to provide for rate uniformity among competitive voice telecommunications providers whose attachments are subject to the Commission’s pole attachment jurisdiction.

In support of its decision to apply universal service contribution obligations on VoIP providers, the Commission cited the principle of “competitive neutrality,” meaning that universal service rules should “neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.”<sup>52</sup> To avoid creating opportunities for “regulatory arbitrage” by a market participant that seeks to use VoIP in order to avoid universal service obligations, the Commission chose to apply the same rules to equivalent services.<sup>53</sup> This approach “reduces the possibility that carriers with universal service obligations will compete directly with providers without such obligations.”<sup>54</sup> Consistent with these VoIP decisions, the Commission should eliminate the unfair competitive advantage cable VoIP providers currently enjoy with respect to pole attachments. In so doing, the Commission would also eliminate the current disparity in attachment rates between CLECs and cable companies

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<sup>50</sup> VoIP LNP Order at para. 1.

<sup>51</sup> *Id.* at para. 27.

<sup>52</sup> Universal Service Order paras. 38-49.

<sup>53</sup> *Id.* at para. 44.

<sup>54</sup> *Id.*

providing functionally equivalent telephone services, thus fulfilling the intent of section 224(e) that pole attachment rates for such services be nondiscriminatory.<sup>55</sup>

## II. LEGAL AUTHORITY

Regardless of whether VoIP is ultimately classified as a telecommunications service, the Pole Attachments Act, Commission regulations, and Federal Court precedents all support applying the Telecom Rate to attachments used to provide commingled cable and VoIP services. Although the Commission has applied the historic Cable Rate to commingled cable and *internet* service, the Cable Rate is not the default rate for commingled cable and IP-enabled *telephony* services and should not be presumed to apply to cable attachments used to provide VoIP. Even if VoIP were generically classified as an information service, which it has not been, the Cable Rate would not apply by default.

The Commission has a duty and ample authority under section 224 to clarify the just and reasonable rate applicable to attachments used for telephone services, such as VoIP, that are not “solely” cable service. Application of the Telecom Rate to cable VoIP attachments is necessary to satisfy the nondiscrimination requirement of section 224(e). In addition, it is reasonable to include VoIP within the meaning of the term “telecommunications service” for purposes of section 224. In any event, the text of section 224 and Federal court decisions make clear that the Telecom Rate is a just and reasonable rate and that the Commission has ample discretion to apply the Telecom Rate to VoIP attachments. Finally, applying the Telecom Rate to similar telephone services is consistent with the Commission’s mandate under section 706 to spur broadband deployment by promoting telecommunications competition.

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<sup>55</sup> 47 U.S.C. § 224(e).

**A. Applying the Cable Rate to VoIP attachments would be unlawfully discriminatory.**

Section 224(e) directs the Commission to implement the Telecom Rate by establishing regulations that “shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for *pole attachments*.”<sup>56</sup> Applying the Cable Rate to cable system attachments used for services functionally identical to telephone services provided by CLECs clearly discriminates between two categories of “pole attachments”: (1) CLEC attachments used to provide traditional telephone service, and (2) cable attachments used to provide VoIP telephone service. The same rate must be applied to both CLEC attachments and cable system attachments used for VoIP—and this rate must be the Telecom Rate. Pursuant to section 224(e), the Commission cannot apply any rate to CLECs other than the Telecom Rate, regardless of what services the carrier may be providing. This subsection provides no exemption for telecommunications carriers that also provide video or internet services. Thus, the only way to satisfy the nondiscrimination obligation of section 224(e) is to apply the Telecom Rate to all CLEC telephony and cable VoIP providers on a competitively neutral basis.

**B. The text, structure, and legislative history of the Pole Attachments Act show that VoIP is a “telecommunications service” for purposes of section 224 and, accordingly, that the Telecom Rate applies to pole attachments used to provide VoIP.**

The nondiscrimination requirement of section 224 applies regardless of whether VoIP is classified as a “telecommunications service” for any purpose. Nevertheless, the text, structure, and legislative history of section 224 show that Congress intended the term “telecommunications services”—at least for purposes of section 224—to include all voice telephony services that compete with traditional telephone services provided by telecommunications carriers.

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<sup>56</sup> 47 U.S.C. § 224(e)(1) (emphasis added).

Accordingly, VoIP plainly falls within the scope of “telecommunications services” as the term is used in section 224 and the Telecom Rate therefore applies to attachments used to provide such VoIP service.

A core purpose of the Telecommunications Act of 1996 was to facilitate entry into telephony markets by non-incumbent entities, including cable systems.<sup>57</sup> As the D.C. Circuit recently noted in *Verizon California v. FCC*, the Commission has read the Telecommunications Act of 1996 “as having the promotion of facilities-based local competition as its fundamental policy . . . .”<sup>58</sup> Consistent with that purpose, with respect to pole attachment rates, the chief point of the Pole Attachment Act amendments of 1996 was twofold: (1) to provide a regulated pole attachment rate for non-incumbent telephone companies (i.e., CLECs); and (2) to provide for a transition up to the Telecom Rate for cable systems that have become full-fledged competitors with CLECs in markets for providing telephone service.

Congress anticipated cable systems would offer a broad array of telecommunications services, including voice telephone services, in competition with traditional telephony or other services offered by CLECs.<sup>59</sup> Moreover, it is clear Congress intended the Telecom Rate to apply to cable companies that offer telephone service. Section 224(d)(3) provides that the Cable Rate

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<sup>57</sup> See, e.g., S. Rep. No. 104-230, Senate Report on 652 at 5 (1996) (“The legislation reforms the regulatory process to allow competition for local telephone service by cable, wireless, long distance, and satellite companies, and electric utilities, as well as other entities”) (emphasis added).

<sup>58</sup> *Verizon California v. FCC*, 555 F.3d 270 at 274 (D.C. Cir. 2009) (citing *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 at 557 (D.C. Cir. 2004) (“*Verizon Cal. v. FCC*”).

<sup>59</sup> In the context of the 1996 Act’s overarching purpose to facilitate competition for telephone service, the use of the term “telecommunications service” in section 224 was broadly intended to include cable companies that compete with local exchange carriers. At the time, “telecommunications service” was generally understood to include telephony and Congress already regarded the evolving cable companies as providers of telecommunications services. Referring to the original Cable Rate, a House Report states: “The formula, developed in 1978, gives cable companies a more favorable rate for attachment than other telecommunications service providers.” House Report on H.R. 1555, H.R. Rep. No. 104-204 at 91 (1995). Because CLECs are the “other” telecommunications service providers, it is clear that Congress regarded cable company competitors as “telecommunications services providers” for pole attachment rate purposes.

shall apply to any pole attachment used by a cable television system “solely to provide cable service” and, *until the effective date of the regulations providing for the new Telecom Rate*, also to any cable system pole attachment used “to provide any telecommunications service.”<sup>60</sup> It follows that, when Congress said the Cable Rate would apply to “any” telecommunications service only until the Telecom Rate is established, Congress plainly meant that the Telecom Rate would thereafter apply to *any* telecommunications service of whatever kind,<sup>61</sup> particularly any voice telephony services (such as VoIP service today).

The Commission has properly construed the term “telecommunications service” broadly where the context requires a broad reading. As the court in *Verizon California* explained in construing the term “any telecommunications services” for purposes of consumer privacy rules under section 222, “different contexts [may] dictat[e] different interpretations” of a defined statutory term.<sup>62</sup> The FCC has concluded in several contexts that services that are functionally similar “from the perspective of the end-user” should be subject to the same regulatory classification.<sup>63</sup> As the court noted in *NCTA v. Brand X*, whether a service includes a telecommunications offering turns on “the nature of the functions the *end user* is offered,” ... for the statutory definition of ‘telecommunications service’ does not ‘res[t] on the particular types of

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<sup>60</sup> 47 U.S.C. § 224(d)(3) (emphasis added).

<sup>61</sup> *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster’s Third New International Dictionary 97 (1976)) (“The term ‘any’ has ‘an expansive meaning, that is, ‘one or some indiscriminately of whatever kind’”).

<sup>62</sup> *Verizon Cal. v. FCC* at 276. Analogously, in the *Number Portability Order*, the Commission considered whether the phrase “all telecommunications carriers” in section 251(e)(2) (regarding the obligation to contribute to the costs of numbering administration) could be read broadly enough to include interconnected VoIP. VoIP LNP Order at para. 28 (emphasis added). Observing that “interconnected VoIP services are increasingly being used as a substitute for traditional telephone service,” the Commission concluded that the term “all” in this context “reflects Congress’s intent to ensure that no telecommunications carriers were omitted from the [numbering administration] contribution obligation, and does not preclude the Commission from exercising its ancillary authority to require other providers of comparable services to make such contributions. Thus, the language does not circumscribe the class of carriers that may be required to support numbering administration . . . .” VoIP LNP Order at para. 28. In this case the Commission has no need to use ancillary authority because section 224 already provides ample discretion.

<sup>63</sup> *Time Warner Telecomm., Inc. v. FCC*, 507 F.3d 205 at 217 (3<sup>rd</sup> Cir. 2007).

facilities used' . . . ."<sup>64</sup> As noted above, the Commission has repeatedly affirmed that VoIP is, from the standpoint of the end user, functionally identical to ordinary telephone service.

**C. The Cable Rate is not the default rate for commingled cable and VoIP services.**

Cable companies argue that, because VoIP has not yet been classified as a telecommunications service, the Cable Rate is the only rate that can apply to attachments used for commingled cable and VoIP. For example, in a letter to Georgia Power Company, CTAG asserts, "[o]nly pole attachments that are specifically used to provide telecommunications service are eligible for the higher telecom attachment rate. See 47 U.S.C. § 224(e)(1)."<sup>65</sup> CTAG's conclusion, however, does not follow.

Section 224 sets forth a separate rate for each of two categories of attachments: the Cable Rate for attachments used "solely" to provide cable service,<sup>66</sup> and the higher Telecom Rate for attachments used by telecommunications carriers to provide telecommunications service. Thus, when a cable system uses a pole attachment to provide services other than cable service, section 224(d) does not compel application of the Cable Rate. If the cable system provides telecommunications services in addition to cable service, its attachments are then statutorily subject to the Telecom Rate. If the cable system does not provide telecommunications service but provides some other type of service in addition to cable television service, the cable formula is then no longer binding on the Commission. Instead, in this alternative situation, the Commission is required only to ensure that the resulting rate is just, reasonable, and

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<sup>64</sup> *NCTA v. Brand X Internet Serv.*, 545 U.S. 967 at 988 (2005) (citations omitted).

<sup>65</sup> CTAG Letter at 3.

<sup>66</sup> Section 224(d)(3) provides that the Cable Rate "shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service." (Emphasis added). 47 U.S.C. § 224(d)(3).